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No. 770

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERADA PETROLEUM CORPORATION,

Petitioner,

—v.—

BETTYE M. MARSHALL,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT I. EDELMAN
JAVITS TRUBIN SILLCOCKS
EDELMAN & PURCELL
375 Park Avenue
New York, New York 10022

REYNOLDS, WHITE, ALLEN & COOK
1340 Tennessee Building
Houston, Texas

Attorneys for Respondent

November 30, 1967

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For more than three years (from July 30, 1964 to date) this respondent has been compelled to resist the forum maneuvers of the petitioner and its co-venturers and joint obligors, all parties to the single contract under which her claim herein is asserted (R. 46-52). This is the sixth Federal court to be occupied with these attempts.*

*1. U. S. District Court for the District of Columbia, 1964-5 (R. 91).
2. U. S. Court of Appeals for the District of Columbia, 1965 (R. 92).
3. U. S. District Court for the Southern District of Texas, 1966 (R. 3).
4. U. S. District Court for the Southern District of New York, 1966 (R. 74).
5. U. S. Court of Appeals for the Fifth Circuit (R. 102).
6. United States Supreme Court.

The Real Question Presented

The "question presented", as delineated in petitioner's brief at page 2, has little resemblance to the facts or circumstances in this case or the substantial grounds upon which the District Court stayed petitioner's action for a Declaratory Judgment in order to permit the direct suit instituted by the "real plaintiff" Bettye Bohanon Marshall to continue in the United States District Court, Southern District of New York. Such exercise of discretion by the District Court was affirmed by the Court of Appeals. The real question presented is whether the District Court before which a Declaratory Judgment suit is instituted by a "defendant" about to be sued elsewhere, has discretion to stay the action before it in favor of the direct suit brought in another Federal District Court by the real plaintiff, where the direct action was imminent and had been previously announced to the declaratory plaintiff, and where the Court finds under all of the circumstances, that the direct action is the more appropriate action and is brought in a more proper forum.

That this was an appropriate exercise of discretion may be gathered from the ensuing summary of facts and circumstances of the prior proceedings herein.

The Contract, the Parties, and the Claim

Continental Oil Company, Marathon Oil Company (then known as Ohio) and Amerada were joint contracting parties (R. 6) with Mrs. Marshall (by her maiden name Bettye M. Bohanon (R. 46)) when she became one of the three key executive employees, with her assignor Arthur A. Cur-

tice and Christian F. Dohm, in the joint and common enterprise created and equally owned by the three oil companies, namely Conorada Petroleum Corporation (R. 29, 55, 56). Conorada was formed for the purpose of seeking, exploring and developing petroleum opportunities and sources outside the United States (R. 53, 54).

As an inducement to attract Curtice and his management team, the employment contracts provided for certain participating interests in eventual oil production recovery in areas where negotiations were initiated by the Curtice management (R. 55).

The underlying contract upon which Mrs. Marshall's identical claim against all three oil companies rests, was executed on January 1, 1949 (R. 45). It is all one contract, one claim and one cause of action, identical as against the three oil companies, relating to their joint venture, joint undertaking and joint contract (R. 53).

It was only when the Libyan oil strikes occurred, and oil production began to flow in the Libyan fields, that Mrs. Marshall's contract claim ripened. That occurred in 1961 or 1962. (In the District of Columbia proceedings, Continental's affiant Thanhouser asserted that marketing of Libyan crude oil first began on June 1, 1962) (R. 87).

Following these events in Libya, attorneys on behalf of Mrs. Marshall investigated the facts and the law and advised her that she had a sound cause of action (R. 87).

In September 1963 Mrs. Marshall made formal and identical demand upon the three oil companies for an accounting under the contract and payment of her claim (R. 88). From that time forward all discussions, meetings and negotiations concerning the identical claim against the

three joint venturers were had with notice to and participation of all three oil companies (R. 89).

Prior History of Forum Proceedings

After breakdown of negotiations with the three oil companies in June 1964, Mrs. Marshall initially brought suit against Continental and Marathon in the United States District Court for the District of Columbia (R. 52), since those two out of the three contracting oil companies were doing business there (R. 47). It was believed that Amerada, petitioner herein, would voluntarily appear in that action to unify the litigation (R. 50).

Instead, Mrs. Marshall (the plaintiff therein) was forthwith subjected to a massive and unrelenting battle by the two oil company defendants in the District of Columbia for dismissal or removal of the case on the ground of *forum non conveniens* (R. 47), and primarily for its transfer to the Southern District of New York. Continental fought for New York and Marathon for New York or Ohio (R. 60). The motions, filed on July 30, 1964, were heavily briefed and arduously litigated, with numerous affidavits, memoranda, reply and supplemental memoranda, making a voluminous court record (R. 91). The proceedings were protracted, to the extent that a full year elapsed between the filing of the oil companies' motion and the decision of the District Court (R. 47).

On June 29, 1965 the United States District Court rendered its decision denying the transfer motions in all respects (R. 70). Then the two oil company defendants filed new motions to vacate the Order (in effect, an application for rehearing) which were again denied. Finally, under

certification, Continental and Marathon applied to the United States Court of Appeals for leave to appeal, and the application was denied (R. 48).

At last Mrs. Marshall's long struggle to hold and proceed with her lawsuit was resolved. On November 24, 1965 the defendant oil companies served their joint Answer to the Complaint—one and a half years after the Complaint had been filed and served (R. 48).

Relevant to the issue herein are certain aspects of the proceedings in the District of Columbia described in the moving affidavit below (R. 48, 49):

> "11. The strongest argument advanced by the Defendant oil companies, and the one which the Court gave the most consideration, was that New York rather than the District of Columbia would be the most convenient forum. They argued a) that Amerada's principal office is in the City of New York; b) that at least 12 of the witnesses reside in, or in the suburbs of New York City; c) that all of the relevant contracts were entered into, executed and delivered in New York City, and were performable or performed there; and d) that the construction of the relevant contracts and determination of the rights and obligations of the respective parties will be governed by the laws of New York. * * *
>
> "12. In the District Court's own opinion (Annex '2') express reference was made to 'Continental's advocacy of New York as the more appropriate forum' and the Court observed that 'a nexus between New York and this litigation is already apparent.' The Court upheld the District of Columbia as a proper forum, even without joinder there of Amerada, but plainly recognized that New York was a fitting alternative if the Plaintiff (Mrs. Marshall) had chosen it. She now must choose it for her suit against Amerada, unless this Court transfers to the District of Columbia, or Amerada submits to that jurisdiction."

With the forum battle in Washington at long last rebuffed—at great cost and travail and delay for the plaintiff Mrs. Marshall—Mrs. Marshall through her counsel addressed formal notice to Amerada (R. 71, 72) as described in the following excerpt from the moving affidavit herein (R. 50).

> "15. In the light of the final disposition of the venue question by the District Court and the Court of Appeals, and in the light of the commencement of the depositions, I deemed it proper and fitting to invite Amerada to voluntarily appear and join issue in the District of Columbia, so that all parties might be joined in a unified action in that court judicially held to be a proper forum. I therefore wrote a letter to the President of Amerada proposing such joinder on their part. Copy of my letter is annexed hereto as Annex '3'. This was my concept of how attorneys should deal with this situation, namely afford an opportunity to resolve the matter in conformance with the recent court decision and obviate dilatory maneuvers and achieve a unity in the litigation. I made it clear that if they rejected the proposal, we would have to proceed with a separate action against Amerada in a proper jurisdiction; and New York was the obvious alternative, as the situs of the principal office of Amerada, and for all the reasons of contact, nexus and convenience previously discussed."

Institution of Amerada's Declaratory Action

Instead of responding to the Notice, Amerada hastily instituted this calculated declaratory judgment action in the Court below (R. 51). The answer was not by letter, but by a jump to a Court as far removed from the situs of the pending litigation, in terms of contract and convenience, as could be imagined (R. 51).

Thereupon, Mrs. Marshall, in conformance with her prior formal notice and stated purpose to sue, instituted her direct action in the United States District Court in New York (R. 39). And in the Court below (the Court of Appellant's choice), Mrs. Marshall moved for dismissal or stay of Amerada's Texas action (R. 38) to allow her own direct plaintiff's action in New York upon the identical issues to proceed to litigation and determination; and the stay was granted.*

I.

The Declaratory Judgment Act confers a discretion upon the courts to entertain, dismiss or stay a suit thereunder, and not an absolute right upon the litigant.

It would be difficult to conjure a more compelling set of circumstances and factors warranting the discretion exercised by the District Court, and affirmed by the Fifth Circuit, than those surrounding the attempt of this petitioner to pre-empt an unsuitable forum by means of its belated declaratory suit. Despite those compelling circumstances, alluded to both by the District Court and the Court of Appeals in the opinions below, this petitioner suggests that its petition should be granted because there is some alleged conflict as between decisions of the different circuits.

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* Following the entry of the Order of Judge Connally below, directing the stay of declaratory suit herein and directing that Mrs. Marshall's direct action in the Southern District of New York proceed with diligence and dispatch, Amerada (petitioner herein) *made a new motion in the New York action* for removal of the case to Oklahoma, which motion was denied. Respondent asks the Court to take judicial notice of the opinion of the United States District Court in the Southern District of New York, annexed hereto as Appendix "1".

None of the cases cited at page 6 of petitioner's brief as indicative of such "conflict" raises any doubt as to the propriety of the exercise of discretion herein. The cases cited concern the particular reasons why in certain patent infringement situations, the pendency of a prior suit affords a basis for restraining a subsequent suit involving the identical parties and identical issues, especially where the declaratory suit affords a more effectual means of clarifying validity and infringement issues in one place and in one suit, in lieu of a multiplicity of infringement suits in various states. Those reasons are totally foreign to the circumstances underlying the discretion exercised herein. The discretion conferred by statute and judicially recognized is acknowledged as well in the very cases cited. For example, in *Martin* v. *Graybar Electric Company*, 266 F. 2d 202 (7th Cir. 1959) (cited by Petitioner) the court wrote:

> "The core question here is whether the issuance or denial of an injunction in a case such as this is mandatory or within the discretion of the District Court and, if the latter, was there an abuse of that discretion?
>
> The Supreme Court when speaking to the problem created by the Federal Declaratory Judgments Act, 28 U.S.C.A. §§2201, 2202, and the initiation of litigation in coordinate courts by different parties has said: 'Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems.' Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 1952, 342 U.S. 180, 183, 72 S. Ct. 219, 221, 96 L.Ed. 200.
>
> We believe that this statement is applicable to and dispositive of the first portion of the question before us. To hold otherwise, laying down a judicial fiat that the prosecution of the subsequent suit must or

must not be enjoined as a matter of law, would solve few problems while at the same time creating many. We can not, nor do we attempt to, foresee the multitude of factors that would dictate the decision of the District Court in any given case.

However, it is obvious that if the decision is to be left to the discretion of the District Court rather than be the result of an unyielding rule of law, that discretion must be utilised in a wise and consistent manner. * * *" (266 F.2d, at 203)

No conflict exists as between the circuits, bearing upon the propriety of the exercise of the court's discretion below. The test defined by this Court in *Kerotest Manufacturing Company* v. *C-O-Two Fire Equipment Co.*, 1952, 342 U. S. 180, 183, 72 S. Ct. 219, 221, 96 L. Ed. 200, remains the guideline for the application of a judicial discretion in these circumstances. It plainly rejects any mechanical, fixed or rigid restraint upon the exercise of such discretion. In *Kerotest*, the Supreme Court affirmed the dismissal of the declaratory judgment proceeding. It did so despite the fact that the declaratory action, like Amerada's here, was instituted prior to the date of joinder of the declaratory plaintiff as a defendant in the direct suit. The Court upheld the Court of Appeals in its reversal of the District Court because of that Court's mistaken notion that the fact of commencement of the declaratory judgment action prior in time to the filing of the direct suit against the declaratory plaintiff (by joinder as a defendant) was determinative. The Supreme Court emphasized that the factors to be considered on retention or dismissal of a declaratory proceeding in these circumstances are "equitable in nature", call for "wise judicial administration, giving regard to conservation of judicial resources", "does not counsel rigid me-

chanical solution of such problems", and "necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts."

In affirming the dismissal of the declaratory suit, the Supreme Court accepted the conclusion of the Court of Appeals that all the foregoing considerations would be best served by prosecution of the direct action in Illinois.

In its opinion in *Kerotest,* the Supreme Court disposed in a footnote of several of the cases cited by the petitioner herein (petitioner's brief at p. 6), namely *Triangle Conduit & Cable Co., Inc.* v. *National Electric Products Corporation,* 125 F. 2d 1008 (3rd Cir. 1942), cert. den. 316 U. S. 676, and *Cresta Blanca Wine Co., Inc.* v. *Eastern Wine Corporation,* 143 F. 2d 1012 (2nd Cir. 1944). In the footnote the court made it clear that those decisions were the creatures of particular circumstances and "do not show any rigid rule", and added that in view of the basis of the Court's own decision "it would not be profitable to discuss these cases in detail."

As for the pretended "conflict" in the Circuits, it is apparent that none exists, in respect to the delineation of the scope of the court's discretion and its justified exercise at bar. Specifically, one of the Circuits mentioned at page 6 of petitioner's brief is the seventh. In *Chicago Furniture Forwarding Co.* v. *Bowles,* 161 F. 2d 411 (7th Cir. 1947), the 7th Circuit affirmed the District Court's dismissal of the plaintiff's declaratory action, and its reasons for doing so are precisely in point:

> "It is well settled that District Courts are endowed with discretion to determine whether the circumstances are such that they may well decline to entertain suits

for declaratory relief. * * * This Court in American Automobile Ins. Co. v. Freundt, 7 Cir. 103 F. 2d 613, 618 quoted with approval from Borchard on Declaratory Judgments as follows: '* * * where the defendant's action is about to begin or has begun it serves no sensible end to permit a plaintiff to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponent's pending or imminent action.'

* * *

"Plaintiff insists that in other cases where the court has declined to take jurisdiction of claims for declaratory relief because of a pending case in which the same relief could be had, the latter had been filed before the declaratory judgment action. We think the respective dates of filing do not necessarily furnish the test. The question is, rather, whether the circumstances at the time of the determination are such as make the further prosecution of the suit for declaratory relief useless". (at 412, 413)

Petitioner also pretends that there is some conflict in the Third Circuit. Its assertion is plainly refuted by the clear enunciation of like principles by that Circuit as are reflected in the decision below. In *Sun Oil Company* v. *Transcontinental Gas,* 203 F. 2d 957 (3rd Cir. 1953), the Third Circuit affirmed the District Court's dismissal of a declaratory judgment action upon the opinion below, which contained the following apt reasoning:

"The Declaratory Judgments Act, 28 USCA §2201, provides that a court 'may declare the rights and other legal relations of any interested party seeking such declaration.' It does not make it mandatory on courts to accept declaratory judgment cases, but puts considerable discretion in them as to whether or not in each case a declaratory judgment should be entered. *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equip-*

ment Co., 342 U.S. 180, 72 S. Ct. 219". (108 F.Supp. 280, 282)

"Here we have a situation where a prospective defendant knowing that it is about to be sued in Texas starts a declaratory judgment proceeding in Pennsylvania against the prospective plaintiff six days before the Texas suit is filed. In my opinion it is a fair inference from this that the plaintiff in the present action has started the declaratory judgment proceeding in this court in order to have the question of its liability tried here rather than in Texas." (*Id.* at 281-2)

Nor is the Tenth Circuit in any such conflict as petitioner suggests. In *Duggins* v. *Hunt*, 323 F. 2d 746 (10th Cir. 1963), the court wrote:

"* * * The grant of jurisdiction contained in the Act is not one of compulsion and the court has the discretion whether to entertain an action for declaratory relief. *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Public Affairs Associates, Inc.* v. *Rickover*, 369 U. S. 111, 82 S. Ct. 580, 7 L. Ed. 2d 604; *Franklin Life Ins. Co.* v. *Johnson*, 10 Cir., 157 F. 2d 653. *The questions of when to exercise jurisdiction, when to hold jurisdiction in abeyance, and when to reject jurisdiction are to be determined initially by the trial court, Guardian Life Ins. Co. of America* v. *Kortz*, 10 Cir., 151 F. 2d 582, *and the judgment of the trial court will be reviewed by this court only to consider whether a clear abuse of discretion appears.*" (323 F. 2d, at 748) (emphasis added)

Nearly all the Circuits have spoken in the same consistent vein. Again, in *Shell Oil Co.* v. *Frusetta*, 290 F. 2d 689 (9th Cir. 1961), the 9th Circuit wrote:

"* * * It is well established that even though jurisdiction may exist under the Declaratory Judgment Act the

granting of declaratory judgments is at the discretion of the District Court. *Brillhart* v. *Excess Insurance Co.*, 1942, 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Maryland Casualty Co.* v. *Boyle Construction Co.*, 4th Cir. 1941, 123 F. 2d 558. Said discretion is to be exercised in accordance with sound judicial principles and the purposes of the Declaratory Judgment Act. The mere fact that Shell succeeded in filing its complaint in the federal court three days before appellees filed their motions in the state court does not automatically entitle Shell to a federal declaratory judgment hearing. *Kerotest Manufacturing Co.* v. *C-O-Two* [sic] *Co.*, 1951, 342 U. S. 180, 72 S. Ct. 219, 96 L. Ed. 200. It is not the purpose of the Declaratory Judgment Act to encourage a race to the courthouse for the purpose of transferring litigation to the federal courts from the state courts." (290 F. 2d 689, 691-2)

In the 2nd Circuit, another one said to be in "conflict", the Court wrote in *Hammett* v. *Warner Bros. Pictures, Inc.*, 176 F. 2d 145 (2nd Cir. 1949), *supra*, at p. 150:

"A general rule for determining priorities as between pending actions on the basis of dates of filing has been stated in some of the cases, but it has been recognized that this rule is not to be applied in a mechanical way regardless of other considerations. *Brillhart* v. *Excess Ins. Co., supra,* 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620; *Chicago Furniture Forwarding Co.* v. *Bowles,* 7 Cir., 161 F. 2d 411; *Western Electric Co.* v. *Hammond,* 1 Cir., 135 F. 2d 283. See *Crosley Corp.* v. *Westinghouse Elec. & Mfg. Co.,* 3 Cir., 130 F. 2d 474, 475; *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.,* 2 Cir., 143 F. 2d 1012, 1014.

In the present controversy, the question of priority is not subject to simple mechanical determination by application of this rule."

Even Mr. Borchard, cited as a significant reliance at page 9 of petitioner's brief, has given a clear expression of

the kind of discretion involved in consideration of a declaratory suit, in just such circumstances as are here pertinent. Petitioner stops short of the relevant quotations from Borchard which follow (Borchard, Declaratory Judgments, 2 Ed. 1941, p. 303):

> " . . . where a party's action is about to begin or has begun, it serves no sensible end to permit his adversary to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponent's pending or imminent action."

II.

The court below properly exercised its discretion in staying this declaratory action.

The fact situation plainly reflects the absence of any need or valid purpose for the institution of an equitable proceeding to "quiet title", or for the invocation of the special discretionary and equitable remedy of Declaratory Judgment to displace the claimant's direct action. For the true plaintiff's case (Mrs. Marshall's) is deep into litigation (two years) in the District of Columbia (R. 91, 92); her suit against Amerada, announced to Amerada in advance, is pending in New York. Amerada never before complained that it was injured by an undetermined claim against it, nor sought declaratory remedies (R. 50-51).

The claimant's suit was imminent, about to begin, anticipated—and actually noticed and announced. No worry or concern that Amerada would be ignored or left at the altar—no long empty corridor of years of uncertainty and unsettled issues facing them; an offer of unified litigation of this single case in that jurisdiction where the Federal Court and the United States Court of Appeals have

found venue, and proper forum and convenience—and a simultaneous notice of institution of separate action, upon rejection of the proposal (R. 50).

Yet they have come here and have called Mrs. Marshall's action, filed pursuant to her notice, a counter-suit. Their own calculated tactic in Texas is sought to be raised to the level of a sorely needed, worthy appeal to equity for relief from not being a defendant.

While the attacks by their colleagues in the District of Columbia raged, for a year and a half, Amerada evinced no need or interest in becoming a party, through declaratory relief. On the contrary, it was obviously a very interested and informed ally. The best they could hope for was a removal to New York. As their colleagues argued in the District of Columbia, New York was the home of Conorada; all of the contracts at issue were made there; the offices were located there; the job of Conorada management was done from there; important witnesses were there; the law of New York would govern; Amerada had its principal offices there; and the other two oil company partners did business and had important offices there.

The forum proceedings in the District of Columbia, and their ultimate result, were highly relevant to Mrs. Marshall's institution of suit against Amerada, for the decision would resolve the question of where—and so Mrs. Marshall awaited that event.

From the time of receipt of Mrs. Marshall's formal letter of claim in September 1963, and through the protracted forum proceedings in the District of Columbia, beginning in June 1964 and ending in November 1965, and even thereafter, from November 1965 to March 1966, Amerada found no need for and did not seek declaratory relief. (See *Timetable, Appendix 2, infra.*)

Amerada only acted when all uncertainty was over, and it was to be a live defendant in New York. And then it ran to the home town of Continental Oil (not its own), basing its actions on the contention that it is now a convenient place for Mrs. Marshall and itself.

The test here at issue is that of propriety, need and purpose. The court below has recognized that this declaratory proceeding is inappropriate, needless, and not in consonance with the purpose for which the remedy was conceived (R. 95-101).

In its opinion, the court below concluded that this declaratory action was triggered by the letter of March 8, 1966 written by Mrs. Marshall's counsel to the president of Amerada, inviting its appearance in the District of Columbia action, and giving notice of institution of a separate suit upon rejection of the proffer (R. 96, 99); and that Amerada made reply by filing the present declaratory action (R. 96).

The Federal courts have spoken clearly and consistently to reject this kind of resort to the Declaratory procedure and misuse of its purposes. *Shell Oil Co.* v. *Frusetta,* 290 F. 2d 689 (9th Cir. 1961); *Sun Oil Company* v. *Transcontinental Gas Pipeline Corp.,* 203 F. 2d 957 (3rd Cir. 1953); *Chicago Furniture Forwarding Co.* v. *Bowles,* 161 F. 2d 411 (7th Cir. 1947); *American Automobile Insurance Co.* v. *Freundt,* 103 F. 2d 613 (7th Cir. 1939); *Aetna Casualty and Surety Co.* v. *Quarles,* 92 F. 2d 321 (4th Cir. 1937); *Seaboard Surety Co.* v. *Texas City Refining,* 109 F. Supp. 468; *American Telephone & Telegraph Co.* v. *Henderson,* 63 F. Supp. 347; *American Insurance Co.* v. *Bradley Mining Corp.,* 57 F. Supp. 545.

In these and like decisions the Federal courts have repeatedly turned aside attempts at invoking the declaratory judgment procedure where it is used not for the purpose of bringing issues to a head which would otherwise lie long dormant and unlitigated, but as a means of gaining procedural advantage where a direct action by the claimant himself, seeking full executory relief, is pending or is imminent or is anticipated.

III.

The clear preponderance of the propriety of the New York forum, where the claimant's direct action is pending, further supports the decision below.

Not only did the Court below properly exercise its discretion to stay the Appellant's misuse of the declaratory procedure in favor of Appellee's pending and noticed direct action, but additionally rested its decision upon the clear preponderance of the propriety of the New York forum.

The Court below properly concluded, upon the facts, that:

> "The Southern District of Texas has no connection whatever with the controversy other than the fact that it is the residence of the defendant, who is willing to make herself available for deposition and discovery in New York" (R. 98-99).

As against the negligible elements of connection of the controversy with Texas, there are the following significant and cumulative elements of connection with the New York forum:

> (1) The underlying contract between the parties upon which the cause of action rests (Conorada-Curtice

contract of January 1, 1949) was executed in the City of New York (R. 98).

(2) The contract among the three oil companies,—Amerada, Continental and Marathon (then Ohio), creating Conorada and establishing the joint venture on which Conorada was engaged, was executed in the City of New York (R. 48, 63).

(3) Conorada Petroleum Corporation, which was the contracting party in behalf of Amerada, and the company for which the services thereunder were rendered, had its principal place of business in the City of New York during the times at issue in the litigation (R. 42, 48, 58).

(4) The operations of Conorada, which are the subject matter of the litigation, were conducted in and from New York during the entire period at issue (R. 18, 42, 54).

(5) All of the principal officers of Conorada had their offices in New York during the periods at issue (R. 42, 48).

(6) Amerada, the Appellant herein and the defendant in Mrs. Marshall's direct action in New York, has its principal office in New York (R. 48, 58).

(7) The law of New York governs the contract and its interpretation (R. 49).

(8) Each of the three oil companies who were parties to the underlying contract and who are joint obligors under Mrs. Marshall's claim, have principal offices and do business in the City of New York (R. 64).

(9) By the admission and contention of the defendant oil companies in the District of Columbia action, at least 12 of the witnesses in the litigation reside in or in the suburbs of New York City, and the same is reflected in the opinion of the United States District Court in the District of Columbia (R. 61). By the same contention all the relevant contracts were not only

entered into, executed and delivered in New York City, but were performable or performed there (R. 48).

In his opinion below, Judge Connally wrote:

> "Under these circumstances, I am of the view that the clear preponderance is in favour of New York as the site of trial. Mrs. Marshall is the real plaintiff and her choice of forums is not to be lightly set aside." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1946) (R. 99).

The heavy financial burden that has been imposed upon the respondent by the multiplicity of forum proceedings, including the costs of resisting the present petition, moves us to petition the Court for an allowance of reasonable damages, under Supreme Court Rule 56, for the delay and consequent expense imposed.

If respondent had been a woman of somewhat more modest means, her cause would have been long since defeated by attrition.

Respectfully submitted,

ALBERT I. EDELMAN
JAVITS TRUBIN SILLCOCKS EDELMAN
& PURCELL
275 Park Avenue
New York, New York 10022

REYNOLDS, WHITE, ALLEN & COOK
1340 Tennessee Building
Houston, Texas

Attorneys for Respondent

ALBERT I. EDELMAN
DOROTHY F. GRAY
Of Counsel